

Jan 13, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID S.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY¹,

Defendant.

No. 1:19-CV-03009-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND REMANDING FOR
ADDITIONAL PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 15, 16. Attorney Edward Wicklund represents David S. (Plaintiff); Special Assistant United States Attorney Jeffrey Eric Staples represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and

¹ Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
2 42 U.S.C. § 405(g).

3 **JURISDICTION**

4 Plaintiff filed applications for Disability Insurance Benefits and
5 Supplemental Security Income on August 27, 2014, alleging disability since June
6 30, 2013, due to diabetes, nerve damage, and arthritis. Tr. 89. The application was
7 denied initially and upon reconsideration. Tr. 167-75, 186-99. Administrative
8 Law Judge (ALJ) Tom Morris held a hearing on December 4, 2017, Tr. 43-86, and
9 issued an unfavorable decision on January 31, 2018, Tr. 19-31. Plaintiff requested
10 review of the ALJ's decision from the Appeals Council. Tr. 247-48, 386-89. The
11 Appeals Council denied the request for review on November 20, 2018. Tr. 3-7.
12 The ALJ's January 2018 decision is the final decision of the Commissioner, which
13 is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this
14 action for judicial review on January 22, 2019. ECF No. 1.

15 **STATEMENT OF FACTS**

16 Plaintiff was born in 1966 and was 47 years old as of the alleged onset date.
17 Tr. 29. He completed an autobody training and repairing degree, and worked a
18 series of odd jobs over his career. Tr. 45, 58-62, 293. He has uncontrolled
19 diabetes and wears braces on nearly all major joints. Tr. 64-66, 434, 649, 653,
20 797. In December 2014, he underwent cubital tunnel release surgery. Tr. 578.
21 His recovery from surgery was complicated by a fall in April 2015, leading to back
22 and hip pain. Tr. 617, 639, 910-11. He testified he was unable to work due to pain
23 in his back and joints. Tr. 63.

24 **STANDARD OF REVIEW**

25 The ALJ is responsible for determining credibility, resolving conflicts in
26 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
27 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
28 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,

201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents the claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show (1) the claimant can make an adjustment to other work; and (2) the claimant can perform specific jobs that exist in the national economy. *Batson v. Commissioner of Social Sec.*

1 *Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make an
2 adjustment to other work in the national economy, the claimant will be found
3 disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

4 **ADMINISTRATIVE DECISION**

5 On January 31, 2018, the ALJ issued a decision finding Plaintiff was not
6 disabled as defined in the Social Security Act. Tr. 19-31.

7 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
8 activity since June 30, 2013, the alleged onset date. Tr. 22.

9 At step two, the ALJ determined Plaintiff had the following severe
10 impairments: peripheral neuropathy, diabetes mellitus, osteoarthritis and allied
11 disorders, degenerative disc disease, obesity, sleep-related breathing disorders,
12 affective disorders, and carpal tunnel syndrome. Tr. 22.

13 At step three, the ALJ found Plaintiff did not have an impairment or
14 combination of impairments that met or medically equaled the severity of one of
15 the listed impairments. Tr. 22-24.

16 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
17 he could perform a range of light work, with the following limitations:

18 he can stand and/or walk 5 hours in an 8-hour day or work tasks
19 where he has a sit/stand option. He can occasionally climb ramps and
20 stairs. He can occasionally balance, stoop, kneel, crouch, and crawl.
21 He can never climb ladders, ropes, or scaffolds. He can occasionally
22 finger bilaterally. He should avoid concentrated exposure to extreme
23 cold, noise (moderate without hearing protection), vibrations, fumes,
24 odors, dusts, gases, and poor ventilation. He should avoid even
25 moderate exposure to hazards such as dangerous machinery and
26 unprotected heights. He is not able to perform at a production rate
27 pace (e.g., assembly line work as where the pace is mechanically
28 controlled) but can perform goal-oriented work or where the worker
has more control over the pace. There can be occasional changes to
the work environment. He may be off task up to 10 percent of the
time over the course of an 8-hour workday.

1
2 Tr. 24.

3 At step four, the ALJ found Plaintiff was unable to perform his past relevant
4 work as a store laborer, teacher aide, material handler, industrial truck operator,
5 fishing lure assembler, recreation aide, or construction worker. Tr. 28-29.

6 At step five the ALJ found that, considering Plaintiff's age, education, work
7 experience and residual functional capacity, there were other jobs that existed in
8 significant numbers in the national economy that Plaintiff could perform,
9 specifically identifying the representative occupations of coin machine collector,
10 storage facility rental clerk, and outside deliverer. Tr. 29-30.

11 The ALJ thus concluded Plaintiff was not under a disability within the
12 meaning of the Social Security Act at any time from June 30, 2013, the alleged
13 onset date, through January 31, 2018, the date of the decision. Tr. 30-31.

14 ISSUES

15 The question presented is whether substantial evidence supports the ALJ's
16 decision denying benefits and, if so, whether that decision is based on proper legal
17 standards. Plaintiff contends the Commissioner erred by (1) failing to find cubital
18 tunnel syndrome to be a severe impairment at step two; (2) giving insufficient
19 weight to a treating physician; and (3) improperly rejecting Plaintiff's subjective
20 complaints. Plaintiff also asserts the case was adjudicated by an unconstitutionally
21 appointed ALJ.

22 DISCUSSION

23 1. Appointments Clause Challenge

24 Plaintiff argues the ALJ decision should be vacated and the claim remanded
25 for further proceedings because at the time the ALJ decision was made the ALJ
26 was unconstitutionally appointed. Plaintiff relies on the Supreme Court's ruling in
27 *Lucia v. SEC*, 138 S. Ct. 2044 (2018). ECF No. 15 at 13-15. Defendant does not
28 argue that the ALJ's appointment was constitutional, but rather asserts Plaintiff has

1 forfeited judicial review of this argument by failing to raise it at the administrative
2 level. ECF No. 16 at 7-16.

3 The Court is aware of no controlling precedent regarding the forfeiture of
4 Appointments Clause challenges in Social Security claims. Such arguments have
5 abounded in the district courts in the months since *Lucia* was decided. The
6 majority of courts have held that failure to raise the claim during the administrative
7 proceedings results in forfeiture. *See, e.g. Rebecca Lou Younger v. Comm’r of Soc.*
8 *Sec. Admin*, No. CV-18-2975, 2020 WL 57814, at *5 (D. Ariz., Jan. 6, 2020)
9 (referencing string cite of district court decisions finding forfeiture); *Taylor v. Saul*,
10 No. 1:16-cv-44, 2019 WL 3837975, at *5-6 (W.D. Va. Aug. 15, 2019); *Hodge v.*
11 *Saul*, No. 1:18-cv-206, 2019 WL 3767130 (M.D.N.C. Aug. 9, 2019). However, a
12 growing body of courts have held the opposite. *See, e.g. Bizarre v. Berryhill*, 364
13 F. Supp. 3d 418 (M.D. Pa. 2019); *Bradshaw v. Berryhill*, 372 F. Supp. 3d 349
14 (E.D.N.C. 2019). The Court is persuaded by the rationale in *Bizarre* and
15 *Bradshaw*, finding the Social Security Act does not require issue exhaustion at the
16 administrative level, and therefore the Appointments Clause challenge was not
17 forfeited.

18 **a. Background**

19 In June 2018, the U.S. Supreme Court issued its opinion in *Lucia v. SEC*,
20 holding that Securities and Exchange Commission (“SEC”) ALJs are “Officers of
21 the United States” subject to the Appointments Clause of the U.S. Constitution.
22 *Lucia*, 138 S. Ct. 2044 (2018). Under the Appointments Clause, only the
23 President, “Courts of Law,” or “Heads of Departments” can appoint “Officers.”
24 *Id.* As none of those actors had appointed the SEC ALJs in *Lucia*, the Supreme
25 Court held that the ALJs had been unconstitutionally appointed, and vacated the
26 action taken by the ALJ. *Id.*

27 Following the Supreme Court’s decision in *Lucia*, the Social Security
28 Administration Acting Commissioner ratified the appointments of all Social

1 Security ALJs, approving the appointments as her own in order to avoid any future
2 Appointments Clause challenges, and issued an Emergency Message detailing
3 instructions for dealing with Appointments Clause challenges raised before an ALJ
4 or before the Appeals Council. *See* Emergency Message EM-18003 REV 2,
5 Important Information Regarding Possible Challenges to the Appointment of
6 Administrative Law Judges in SSA’s Administrative Process (effective Aug. 6,
7 2018).² The present matter was pending at the Appeals Council at the time *Lucia*
8 was decided and the Social Security Administration issued the Emergency
9 Message.

10 **b. Timeliness under *Lucia***

11 Defendant argues that Plaintiff’s failure to assert a challenge to the ALJ’s
12 appointment at any point during the administrative proceedings has resulted in
13 forfeiture of the issue. ECF No. 16 at 7. Defendant relies largely on the Supreme
14 Court’s statement in *Lucia* that a party “who makes a *timely* challenge to the
15 constitutional validity of the appointment of an officer who adjudicates his case is
16 entitled to relief.” *Id.* (emphasis in briefing).

17 *Lucia*’s timeliness language does not resolve the current question. There
18 was no timeliness or exhaustion question raised in *Lucia*’s litigation, as Mr. Lucia
19 raised his challenge before the SEC’s appellate body and in the lower federal court
20 proceedings. *Lucia*, at 2050. The Supreme Court’s use of the word “timely” to
21 describe Mr. Lucia’s challenge does not foreclose other procedural histories from
22 also being found timely. As was noted in *Bizarre*, 364 F. Supp. 3d at 420-21,
23 “[t]he [*Lucia*] majority’s statement as to timeliness was not a bright-line
24 demarcation ... it simply confirmed the obvious timeliness of the fully preserved
25 and exhausted claim as presented.” Therefore the analysis does not end here.

26 **c. Exhaustion requirement**

27 ² Available at
28 <https://secure.ssa.gov/apps10/reference.nsf/links/08062018021025PM>

1 The operative question is whether exhaustion of issues is required at the
2 administrative level. The leading case addressing issue exhaustion before the
3 Social Security Administration is *Sims v. Apfel*, 530 U.S. 103 (2000). The
4 Supreme Court engaged in a lengthy discussion of the Social Security process,
5 noting that “requirements of administrative issue exhaustion are largely creatures
6 of statute,” and finding the Social Security Act to contain no such requirements.³
7 *Sims*, 530 U.S. at 107. Based on the non-adversarial nature of Social Security
8 proceedings, and the largely pro forma appellate review process, the Court
9 ultimately held issue exhaustion before the Appeals Council was not a requirement
10 “in order to preserve judicial review of those issues.” *Id.* at 112. However, the
11 Court noted that the question of whether a claimant must exhaust issues in front of
12 the ALJ was not before it. *Id.* at 107.

13 Defendant argues that, despite *Sims*, issue exhaustion is required before the
14 ALJ, citing *Meanel v. Apfel*, 172 F.3d 1111 (9th Cir. 1999), for the proposition that
15 a claimant “must raise all issues and evidence at their administrative hearings in
16

17 ³ Defendant cites *Kabani & Co. v. SEC*, 733 Fed. Appx. 918 (9th Cir. 2018)
18 in support of holding an Appointments Clause claim to be forfeited for not being
19 raised before the Agency. ECF No. 16 at 8. However, *Kabani* involved an SEC
20 matter, which is governed by a statutory issue exhaustion requirement: “No
21 objection to an order or rule of the [SEC] . . . may be considered by [a reviewing]
22 court unless it was urged before the [SEC] or there was reasonable ground for
23 failure to do so.” 15 U.S.C. § 78y(c). The Ninth Circuit has also dismissed as
24 untimely *Lucia* claims related to the Department of Labor, which has a statutory
25 issue-exhaustion requirement. *See Zumwalt v. National Steel and Shipbuilding*
26 *Company*, No. 18-72257, -- Fed. Appx --, 2019 WL 6999492 (9th Cir., Dec. 20,
27 2019); *Bussanich v. Ports America*, 787 Fed. Appx 405 (9th Cir. 2019). No similar
28 statutory mandate exists in the Social Security Act.

1 order to preserve them on appeal.” ECF No. 16 at 10. Defendant goes on to cite
2 an extensive string of cases finding various issues to be forfeited for failure to raise
3 them during administrative proceedings. *Id.* at 10-13. However, *Meanel* and the
4 other cases cited by Defendant all address a claimant’s failure to raise factual
5 issues regarding the merits of their disability claim, or their failure to challenge
6 how a particular ALJ conducted the proceedings in the particular case. These are
7 all issues directly within the ALJ’s purview, and in such situations mandating
8 exhaustion is administratively efficient, particularly in light of the agency’s
9 expertise. *See e.g. Meanel*, 172 F.3d at 1115 (noting that “the ALJ rather, than this
10 Court, was in the optimal position” to resolve the claimant’s factual challenge);
11 *Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017)(“an agency, its experts,
12 and its administrative law judges are better positioned to weigh conflicting
13 evidence than a reviewing court.”).

14 Conversely, requiring a claimant to raise a constitutional challenge regarding
15 the appointment processes of the entire agency to an individual ALJ who had no
16 power to decide the issue (and who was hired through the very process being
17 challenged) makes little sense. *See Weinberger v. Salfi*, 422 U.S. 749, 767
18 (1975)(“[M]atter[s] of constitutional law [are] concededly beyond [SSA’s]
19 competence to decide.”); *Bizarre*, 364 F. Supp. 3d at 424 (quoting *Califano v.*
20 *Sanders*, 430 U.S. 99, 109 (1977))(“Constitutional questions obviously are
21 unsuited to resolution in administrative hearing procedures and, therefore, access
22 to the courts is essential to the decision of such questions.”). Furthermore, one
23 week after the *Lucia* decision was released, the Social Security Administration
24 issued an Emergency Message instructing ALJs to address Appointments Clause
25 challenges raised before them with the following language: “The claimant
26 [/representative] also raised a challenge to the manner in which I was appointed as
27 an administrative law judge under the Appointments Clause of the Constitution. I
28 do not have the authority to rule on that challenge and do not address it further in

1 this decision[/dismissal].” Soc. Sec. Admin. EM-18003 REV, Important
2 Information Regarding Possible Challenges to the Appointment of Administrative
3 Law Judges in SSA’s Administrative Process-Update (effective date June 25,
4 2018).⁴ To mandate a claimant raise an issue before an officer who had no
5 authority to decide it, simply to preserve the issue for a later theoretical appeal, is
6 contrary to administrative efficiency.

7 In support of the argument that issues must be raised during the
8 administrative process, Defendant points to several Social Security regulations
9 requiring claimants to raise all issues to the agency at the earliest possible juncture.
10 ECF No. 16 at 14. However, the cited regulations all pertain to the merits of the
11 claimant’s disability claim, or objections to individual ALJs, not the system as a
12 whole.⁵ 20 C.F.R. §§ 404.933(a)(2), 404.939, 404.940, 404.946(b). While an SSA

14 ⁴ available at
15 <http://dataserver.lrp.com/DATA/servlet/DataServlet?fname=PolicyNet->
16 [Instructions+Updates-](http://dataserver.lrp.com/DATA/servlet/DataServlet?fname=PolicyNet-)
17 [EM+18003+REV+Important+Information+Regarding+Possible+Challenges+to](http://dataserver.lrp.com/DATA/servlet/DataServlet?fname=PolicyNet-)
18 [+the+Appointment+of+Administrative+Law+Judges+in+SSA%BFs+Administrati](http://dataserver.lrp.com/DATA/servlet/DataServlet?fname=PolicyNet-)
19 [ve+Process--UPDATE.htm](http://dataserver.lrp.com/DATA/servlet/DataServlet?fname=PolicyNet-). This Emergency Message was revised six weeks later
20 following the Acting Commissioner’s reappointment of all Social Security ALJs.
21 See <https://secure.ssa.gov/apps10/reference.nsf/links/08062018021025PM>

22 ⁵ Defendant’s passing reference to an expedited appeals process in certain
23 cases where constitutional issues are raised is similarly inapplicable to the current
24 matter. See 20 C.F.R. § 404.924, stating: “You may use the expedited appeals
25 process if . . . you have claimed, and we agree, that the *only factor* preventing a
26 favorable determination or decision is a provision in the law that you believe is
27 unconstitutional.” (emphasis added). The constitutionality of the appointment of
28 the ALJ was not the only factor preventing a favorable determination here, as the

1 claimant must state the reasons he disagrees with an adverse disability
2 determination in petitioning for ALJ review, 20 C.F.R. § 404.933(a)(2), the issues
3 before the ALJ are “the issues brought out in the initial, reconsidered or revised
4 determination that were not decided entirely in [the claimant’s] favor[,]” 20 C.F.R.
5 § 404.946(a), which can hardly be expected to include a constitutional challenge to
6 the ALJ’s authority. On the contrary, these issues are those germane to the
7 disability application itself, most commonly in the form of objections to the
8 agency’s treatment of medical or vocational evidence or testimony. While an ALJ
9 or any party may also raise new issues prior to the hearing, 20 C.F.R. § 404.946(b),
10 this is designed to afford a claimant the opportunity to identify new disability-
11 related evidence or testimony obtained after the written request for hearing but
12 before the hearing itself. *See id.* (a new issue “may be raised even though it arose
13 after the request for a hearing and even though it has not been considered in an
14 initial or reconsidered determination.”). The regulation regarding disqualification
15 of a particular ALJ references individual ALJ bias or interest in the matter, and
16 anticipates appointment of a different ALJ if necessary; it does not provide a
17 mechanism for a claimant to object to all ALJs. 20 C.F.R. § 404.940. None of the
18 cited regulations state that issues not raised are forfeited. These regulations do not
19 impose an issue exhaustion requirement as the Commissioner contends.

20 Absent statutory directive or binding precedential court ruling, the Court
21 finds no basis to create an issue exhaustion requirement with respect to the
22 Appointments Clause challenge. Plaintiff did not forfeit his right to bring the
23 challenge by not raising it during the administrative proceedings.

24 **d. *Lucia* applied to Social Security ALJs**

25
26
27 Social Security Administration found Plaintiff did not meet the medical
28 requirements of disability.

1 As to the merits of Plaintiff's appointments clause challenge, *Lucia's*
2 reasoning has been applied to other ALJs, requiring that they, as "inferior officers,"
3 be appointed according to the Appointments Clause. *See, e.g., Bank of Louisiana*
4 *v. FDIC*, 919 F.3d 916, 921 (5th Cir. 2019) (FDIC ALJs); *Jones Bros., Inc. v. Sec'y*
5 *of Labor*, 898 F.3d 669, 679 (6th Cir. 2018) (Department of Labor Federal Mine
6 Safety and Health Review Commission ALJs); *Island Creek Coal Co. v.*
7 *Wilkerson*, 910 F.3d 254, 257 (6th Cir. 2018)(Department of Labor Benefits
8 Review Board ALJs). Defendant has not argued that Social Security ALJs are not
9 inferior officers under the Appointments Clause. ECF No. 16 at 8 n.1. Because
10 Defendant has not disputed the merits of Plaintiff's challenge and limited the
11 response to the forfeiture issue, the Court finds Plaintiff's challenge to be
12 meritorious for the reasons set forth in *Lucia*.

13 CONCLUSION

14 Defendant has not disputed the merits of the Appointments Clause
15 challenge. As the Court finds the challenge was not forfeited, this claim is
16 remanded for rehearing before a properly appointed ALJ. The merits of Plaintiff's
17 additional assignments of error are not being addressed because a new ALJ must
18 conduct a *de novo* review on remand.

19 Accordingly, **IT IS ORDERED:**

- 20 1. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is
21 **GRANTED**.
- 22 2. Defendant's Motion for Summary Judgment, **ECF No. 16**, is
23 **DENIED**.
- 24 3. The matter is **REMANDED** to the Commissioner for additional
25 proceedings consistent with this Order.
- 26 4. An application for attorney fees may be filed by separate motion.
- 27
- 28

1 The District Court Executive is directed to file this Order and provide a copy
2 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
3 the file shall be **CLOSED**.

4 **IT IS SO ORDERED.**

5 DATED January 13, 2020.

A handwritten signature in black ink, appearing to be "M", is written above a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE